

**IN THE JUSTICE OF THE PEACE COURT  
IN AND FOR THE STATE OF DELAWARE  
OFFICE OF THE CHIEF MAGISTRATE**

<b>IN RE:</b>	)	<b>C.A. No. JPCM-11-001</b>
<b>RULE 57 REPRESENTATION</b>	)	
<b>BY LEE HERBERT</b>	)	
	)	

**Decision and Order**

In March of 2011, Judge James Hanby referred to the Office of the Chief Magistrate a concern about the Form 50 representation of Lee Herbert in a set of consolidated cases heard by Judge Hanby earlier that month. Mr. Herbert currently holds certificates of representation for four separate entities, Clear Choice Technical Application Group, Clear Choice Media Group, Advertising in Motion.com Inc. and Horton Brothers, Inc. After an initial review of the stated concern, the Form 50 privileges of Mr. Herbert were suspended in anticipation of revocation. Mr. Herbert requested a hearing and the Court scheduled an opportunity for Mr. Herbert to show cause why his privileges under Rule 57 should not be revoked. This is the Court's opinion after that hearing.

Non-lawyers generally may not practice law in this state.<sup>1</sup> The Delaware Supreme Court regulates all aspects of the practice of law, including what is and is not the unauthorized practice of law.<sup>2</sup> Corporations and other artificial entities typically must be represented by counsel in all matters before the Courts of Delaware.<sup>3</sup> Recognizing the importance of the Justice of the Peace Court to be available for prompt, efficient, cost-effective and fair adjudication of matters involving smaller monetary values for the people and artificial entities of this State, the Supreme Court instituted Rule 57.<sup>4</sup> That Rule permits an artificial entity to be represented by an employee or officer of that entity, with certain stated limitations. The process whereby an artificial entity obtains and maintains authorization to have an individual represent the entity is regulated by Supreme Court Rule 57 and Justice of the Peace Court Policy Directive 95-152 (revised).

Rule 57 has two distinct purposes. As stated, the first is that it is intended to allow artificial entities easier and less costly access to the Court. Second, however, the Rule is written to protect the Court from unauthorized or inappropriate representation of artificial entities. Under

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<sup>1</sup> *Delaware Optometric Corporation v. Sherwood*, Del. Supr., 128 A.2d 812 (1957).

<sup>2</sup> *Id.*

<sup>3</sup> *Transpoylmer Industries, Inc. v. Chapel Main Corp.*, Del. Supr., 582 A.2d 936 (1990).

<sup>4</sup> See Delaware Supreme Court Rule 57.

the terms of that Rule, the privileges of a Form 50 holder are dependent upon several factors established to support that second intended goal of the Rule. The organization to be represented must be in good standing and must be either a Delaware artificial entity or one registered to do business in the state.<sup>5</sup> In the case of the named representative, the person must be an officer or employee of the entity, with few exceptions; the person must not have been disbarred from or currently under suspension from, the practice of law in any jurisdiction; the named agent must not have been convicted of a felony or crime of dishonesty in the prior ten years; and the person must not have been found to have engaged in the unauthorized practice of law.<sup>6</sup> The veracity of these matters is ensured by the submission of the certificate of representation, which is an affidavit.<sup>7</sup> For further protection of the Court and the process, the Rule and the Legal Memorandum require artificial entities and their agents to timely inform the Chief Magistrate's office of changes in representation or status of the artificial entity.<sup>8</sup>

Those entities and agents that fail in any of their obligations to the Court are subject to a full range of possible penalties. First, the Rule provides that a certification presented that contains false or fraudulent information shall be forwarded by the Chief Magistrate to the Department of Justice and the Board on the Unauthorized Practice of Law.<sup>9</sup> Second, both the entities and the agents are subject to the sanctions contained in Justice of the Peace Court Civil Rule 11.<sup>10</sup> Finally, the Chief Magistrate, in his or her sole discretion, may, upon referral of a matter to his or her attention, revoke the agency.<sup>11</sup>

In the case at hand, here are the pertinent facts: Mr. Herbert had a relationship with the principal of an entity known as Horton Bros, Inc. As part of a personal transaction, Mr. Herbert allowed the principal of Horton Bros, Inc. to hold the title to some of the vehicles owed by Mr. Herbert's three companies. The terms of the personal transaction were, according to Mr. Herbert's testimony, concluded favorably, but, before he could request the titles be returned to him, he became severely incapacitated. It took Mr. Herbert over a year and a half to regain his ability to do business, but, when he had recovered, he requested the titles to the vehicles. That request was denied, but Mr. Herbert came to find that the other party had placed a lien on the vehicles in the name of Horton Brothers, Inc. Mr. Herbert attempted to recover the vehicles through court process of replevin in a series of filings in this Court.

In addition, he took action to have the liens on the vehicles removed. To this end, Mr. Herbert came to realize that there was no company in the State of Delaware by the specific name of Horton **Brothers**, Inc. The company with which he had been doing business was Horton

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<sup>5</sup> Delaware Supreme Court Rule 57(c)(2).

<sup>6</sup> Delaware Supreme Court Rule 57 (c)(3).

<sup>7</sup> Delaware Supreme Court Rule 57 (c).

<sup>8</sup> Delaware Supreme Court Rule 57 (c)(7).

<sup>9</sup> Delaware Supreme Court Rule 57 (c)(8).

<sup>10</sup> Id.

<sup>11</sup> Delaware Supreme Court Rule 57 (c)(9).

**Bros**, Inc. The lien on the vehicles was in the name of Horton **Brothers**, Inc. According to Mr. Herbert's testimony (during the course of which the Court admonished him twice that he could invoke his 5<sup>th</sup> Amendment right against self-incrimination), Mr. Herbert consulted with both the Secretary of State's office and the Division of Motor Vehicles before incorporating a company in the name of Horton **Brothers**, Inc. and sending to the DMV releases of the liens on the vehicles in question. At trial on the replevin actions, Mr. Herbert sought to introduce these "clean" titles as proof of the in appropriate possession by Horton Bros, Inc.

It is on this basis that Judge Hanby referred this matter to the office of the Chief Magistrate for review and possible revocation of the Form 50s of Mr. Herbert. In both the replevin hearings and the hearing on this revocation, Mr. Herbert was forthright and open about his efforts to remove these liens. Upon questioning by the Court in this matter, Mr. Herbert allowed that these actions could look suspect to someone who was not aware of the whole set of circumstances giving rise to this situation, but to someone who understood that the liens were improperly placed it should not. Mr. Herbert relied upon the provisions of 21 Del. C. §2338 to support his claim that the liens were actually void, but he never took court action to enforce that position. Instead he relied upon the self-help measures outlined above. He did so unapologetically and with the poise of a person believing they held the moral high-ground in their actions.

In examining these facts and the requirements imposed upon persons and entities in Rule 57 and the policy directive, the Court is hard pressed to say that the actions of Mr. Herbert are a violation of the specific requirements of the applicable provisions of either edict. Mr. Herbert's Form 50 filing was proper in all technical senses of the word. When questioned in both the replevin trial and in the hearing on this matter he was forthright and forthcoming in describing the efforts that he had taken to release the liens. There was no apparent direct fraud on the Court in the actions of Mr. Herbert.

However, though the actions of Mr. Herbert do not appear to be a clear violation of the Form 50 process or of any duty of candor to the Court, it is abundantly clear that such actions would not be tolerated by any Court were they undertaken by a member of the Delaware Bar. It is apparent that Mr. Herbert assumed, veiled under a corporate cloak, the identity of another for the purpose of improving his own position. In doing so, he has committed an act that is potentially contrary to the law and one that stretches the boundaries of ethical behavior. Were a member of the Bar to behave similarly, sanctions would swiftly follow.

As such, the question now before the Court is whether the limited right to practice law conveyed through Rule 57 brings with it a similar level of ethical behavior as that required of members of the Bar. In answer to that question I find that it would be impossible as a practical matter to require that all the ethical duties of an attorney authorized to practice in this state apply

to those practicing in this Court under Rule 57. However, I further find that there is a heightened requirement of good faith and fair dealing required of such agents that is inherent in Rule 57 and the process of representation authorized under that Rule is such that agents must act in a manner befitting the privilege to practice law in this limited capacity. The Rule is established as a safeguard for the Court as well as a tool for those who would partake of its benefits. The allowance of an artificial entity to act through such an agent is contrary to all other precedent. The Supreme Court was careful to establish a wide range of possible penalties for those who would abuse the ability to represent an organization. To say that there is no heightened requirement for the behavior of those enjoying that privilege in the face of these facts would be to ignore that it is a unique and precious allowance made by the Supreme Court.

To that end, I find that the heightened standard applicable to Rule 57 agents is found in the same general basis as the requirements of the Delaware Lawyer's Rules of Professional Conduct and in the Principles of Professionalism for Delaware Lawyers. Like these rules, the requirements for artificial entity agents are rules of reason and require adherence to general principles of good faith, fair dealing and candor in written and oral communications with other parties and the Court. More specifically, those governed by Rule 57 are held to the applicable requirements of Rule 8.4 of the Delaware Lawyer's Rules of Professional Conduct, which states:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

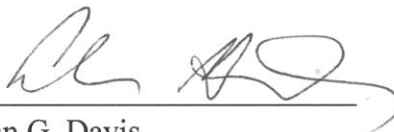
- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

I do not make these findings without knowledge that, until now, Rule 57 agents have not been provided specific notice of the duties inherently required of them in regard to their representation of an artificial entity. This opinion and future modifications to the policy directive regulating this practice will assist in that notice function. From now on, agents will at least be aware of the additional responsibilities required of them in taking up this representation.

This leaves the Court with the necessity of determining the fate of Mr. Herbert's Form 50s under these circumstances. I believe the facts support that, at the very least, Mr. Herbert's actions would run afoul of the provisions of subsection (c) of Rule 8.4. His actions were certainly deceitful. However, it would be unjust to impose such conditions upon Mr. Herbert, considering that he was without advance knowledge that actions outside those directly affecting his conduct in Court could result in a termination of his Rule 57 privileges. Because of this, I will not revoke his privileges at this time. I do believe, however, that Mr. Herbert acted consciously in this matter and that he did so in such a way that affected his conduct in addressing the Court on his replevin cases.

As such, all of his Form 50s will remain suspended for a period of one year; he may apply for reactivation of his privileges at any point on or after August 1, 2012, subject to the conditions herein. No such privileges shall be granted to Mr. Herbert for the purpose of representing Horton Brothers, Inc. In order to preserve the integrity of the Court's processes, that entity shall be required to be represented by counsel in all future proceedings. Furthermore, the Court shall be referring this matter to the Department of Justice for investigation. If that investigation results in a criminal conviction of Mr. Herbert, the Court will, without the necessity of further notice, revoke any and all Rule 57 privileges then held by Mr. Herbert or any held in suspension as a result of this decision.

IT IS SO ORDERED this 2<sup>ND</sup> day of August, 2011.

A handwritten signature in dark ink, appearing to read 'Alan G. Davis', is written over a horizontal line.

Alan G. Davis  
Chief Magistrate